No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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1. Respondents argue (Br. in Opp. 11-16) that this Court should not hold the petition in this case for the decision of the en banc court of appeals in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.) (to be argued Sept. 19, 1996). In *Lisa Le*, the full court of appeals ordered initial hearing en banc to consider the issues presented in this case, and yet in this case, a panel of the same court refused to vacate its judgment or to stay its mandate pending the decision of the en banc court in *Lisa Le*.

We filed our certiorari petition and asked the Court to hold the petition for two reasons. *First*, the panel's decision is wrong as a matter of law on several important

issues. Since the panel denied rehearing and refused to vacate its judgment, it was necessary to file a petition for a writ of certiorari to preserve our opportunity for review by this Court in this case. If the en banc court in *Lisa Le* disagrees with our positions on reviewability and the merits, we would expect to file a petition for a writ of certiorari in *Lisa Le*, and to ask this Court to consider this case and that one together. But had we not petitioned for certiorari in this case, and had this case returned to the district court, the district court might well have felt constrained to take action based on an erroneous decision that is even now under review by the en banc court of appeals in *Lisa Le*—including entering an injunction requiring the State Department to process in Hong Kong a new visa application by respondent Truc Hoa Thi Vo. Such an order could render this case moot, if the visa were then granted and Ms. Vo traveled to the United States.[1]

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[1] Ms. Vo's application was considered in Hong Kong under the Department's 1994 interim policy of resuming the processing of such applications in Hong Kong, and she currently is eligible for reconsideration of her application in Hong Kong. See Pet. 6; Gov't C.A. Rehearing Pet. 3, 13-14. On November 30, 1994, Ms. Vo was informed by consular officials in Hong Kong that she would not be granted an immigrant visa at that time, but that she had a year in which to present additional information to support her application. See *id.* at 14; Gov't C.A. Supplemental Br. on Mootness 13. On November 16, 1995, she presented additional (but still insufficient) information in support of her application, and she was informed by a consular official in Hong Kong that her application was extended for an additional year, until November 16, 1996. See Pet. App. 45a.

The court of appeals held, however, that this case was not moot because, even after Ms. Vo's application *expired*, she would be free to file another application, which would be governed by the State Department's *current* policy against processing applications in Hong Kong. See Pet. App. 46a. "In fact," the court stated, "the allegedly wrongful behavior—the refusal to process applications of this type at the United States Consulate General in Hong Kong—is virtually certain to recur, and will quite probably recur in the case of Ms. Vo should her current application be turned down." *Ibid.* Thus, if this case were to be returned to the district court, Ms. Vo's current application were finally rejected, and she were to file a new visa application, that new application would be governed by the current policy, which, the court of appeals held in this case, is unlawful.

Second, the remand ordered by the panel in this case for consideration of class certification (Pet. App. 47a) could seriously interfere with the en banc proceedings in the *Lisa Le* case as well. If this case returned to the district court, that court might well regard itself as bound by the ruling of the court of appeals panel, as the law of the case. If the district court then certified a class (as respondents undoubtedly would request), that law of the case might apply to the entire class of screened-out Vietnamese migrants in Hong Kong, including any plaintiffs in *Lisa Le* who were members of the certified class. At a minimum, further proceedings in the district court would likely lead to further appeals and requests for stays, simply to prevent this case from requiring a change in the Department's policy while the *Lisa Le* case is pending.

2. Respondents argue (Br. in Opp. 17-18) that the government failed to preserve the argument that the anti-discrimination provision in Section 202(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1), does not apply to consular venue, and that consular venue is governed by INA Section 222(a), 8 U.S.C. 1202(a). That argument fails to acknowledge that respondents' principal argument below was that the Department was violating its consular venue regulation, 22 C.F.R. 42.61(a) (1994), which was promulgated pursuant to Section 222(a).[2] Although we

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[2] The principal issue addressed in both parties' initial appellate briefs was whether the Department's policy of not accepting immigrant visa applications from screened-out migrants in Hong Kong violated

did not emphasize, in our initial court of appeals brief in this case, the point that consular venue is governed by Section 222(a) rather than Section 202(a)(1), we did point out that the consular venue regulation on which respondents relied was promulgated pursuant to the "very specific authority" of Section 222(a) (see Gov't C.A. Br. 27), and we argued that, under that regulation, the State Department has discretion to determine the appropriate venue for immigrant visa applications, which might be affected by "[w]orld events, foreign policy objectives and/or budgetary constraints." *Id.* at 26-27.

We further argued below that the Department's policy regarding processing of immigrant visa applications filed by screened-out Vietnamese migrants in Hong Kong does not violate Section 202(a)(1). See Gov't C.A. Br. 36-38. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are

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the Department's consular venue regulation, 22 C.F.R. 42.61(a) (1994). See Resp. C.A. Br. 20-29; Gov't C.A. Br. 26-34. That issue had also been the principal focus of the district court's decision. See Pet. App. 26a-28a. When this case was filed, that regulation provided that, "[u]nder ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides." 22 C.F.R. 42.61(a) (1994). During the pendency of the appeal, the State Department amended the regulation to provide that, "*[u]nless otherwise directed by the Department*, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence." See 22 C.F.R. 42.61(a) (emphasis added). The court of appeals concluded that the amendment mooted respondents' challenge based on the prior version of the regulation, because the State Department had exercised its authority under the regulation to "direct otherwise" when it directed that screened-out Vietnamese migrants must apply for immigrant visas in Vietnam. See Pet. App. 7a-8a. The court of appeals did not address the significance of the government's representation that the regulation was based on Section 222(a).

not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). The same rule, we submit, is true of arguments made in opposition to a federal claim. See *Illinois* v. *Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring in the judgment). In this case, respondents presented the claim that the Department's policy violates Section 202(a)(1), and the Department unquestionably opposed that claim. Moreover, when the court of appeals issued its decision relying squarely on its erroneous interpretation of Section 202(a)(1) but overlooking Section 222(a) completely, we explained the role of Section 222(a) at length in our petition for rehearing.

3. Respondents argue (Br. in Opp. 18-21) that the anti-discrimination rule of Section 202(a) governs the location at which visa applications are processed. They recognize that the issue in this case is not *whether* the United States will process screened-out Vietnamese migrants' immigrant visa applications, but *where*. They suggest, however, that Section 202(a)'s reference to "priority" in the issuance of a visa incorporates the timing of issuance of a visa, which (they assert, without any authority) "is inextricably related to place of processing." Br. in Opp. 18.

Respondents make little effort to come to terms with Section 222(a). As we explain in our certiorari petition (at 16), that Section separately and directly addresses the issue of consular venue, and gives the Secretary broad discretion to establish regulations for the place of application for immigrant visas. Under respondents' reading of the INA, the Department would have no authority to establish procedures requiring more careful verification of documentation and information about citizens of specific countries associated with terrorism, because the processing time required by that additional verification would

give citizens of other countries a "priority" in the "issuance" of a visa. The flaw in that construction is that such special processing rules do not require any outcome in the ultimate issuance of any visa, which is the subject covered by Section 202(a). And so it is in this case: the Department requires screened-out migrants in Hong Kong to present their applications in their home countries, but, once those applications are filed in the proper location, consular officers may not deny a visa because the applicant is a Vietnamese national. Indeed, Vietnamese nationals have been among the greatest beneficiaries of immigrant visas in recent years. See Pet. 19.

4. Respondents argue (Br. in Opp. 22) that the court of appeals correctly held that they have a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge the State Department's policies governing processing of immigrant visa applications by consular officials. Should the en banc court of appeals in *Lisa Le* disagree with our position on that point and hold that aliens residing abroad (or United States sponsors of such aliens) may challenge immigrant visa processing policies under the APA, such a ruling would be contrary to the Eleventh Circuit's decision in *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, 1507, cert. denied, 502 U.S. 1122 (1992), and could have far-reaching consequences for immigration litigation.

Respondents rely on two cases from the 1950s addressing judicial review of deportation and exclusion orders. Br. in Opp. 22. Those cases were decided before the INA was amended in 1961 to overturn one of them, *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). As we explain in our petition (at 20-21), Congress expressly provided a right under the INA to review of deportation and exclusion orders; it provided no corresponding right to review of visa decisions. Congress's provision for judicial

review in the one situation but not the other provides persuasive evidence that Congress intended to foreclose review in the latter. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). And since the INA supplants the APA as the avenue of judicial review in immigration matters (see Pet. 20), there is no judicial review available here.[3]

Rusk v. *Cort*, 369 U.S. 367 (1962), is not to the contrary. There, the Court concluded that Congress had not intended, in the INA, to require that "a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States." *Id.* at 375. The Court found that the review provisions made available under the INA to natives living abroad who wish to challenge adverse citizenship determinations were optional, and were not intended to deny pre-existing remedies that existed before the 1952 enactment of the INA. *Ibid.* The Court also reached its conclusion in light of the serious constitutional questions that would be presented by a contrary ruling. See *id.* at 370; *id.* at 380-383 (Brennan, J., concurring) (noting that a contrary decision would mean that a person previously deemed to be an American citizen "may by unreviewable administrative

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[3] Respondents invoke Justice Scalia's separate opinion in *INS* v. *Doherty*, 502 U.S. 314, 330 n.1 (1992), where he suggested that the standard of review under the APA is still applicable in judicial review of deportation orders, which, strictly speaking, is taken under the INA. As that opinion noted, however (*ibid.*), the APA itself provides that the proper form of proceeding is, presumptively, "the special statutory review proceeding relevant to the subject matter in a court specified by statute" (see 5 U.S.C. 703)—here, the review proceedings under the INA. There is no support for the proposition that, if Congress foreclosed review of a matter when it enacted the substantive and review provisions of the INA, review might nonetheless be had by resort to the APA alone.

action be relegated to the status of an alien"). Those factors are not present here. Before the enactment of the INA, there was no pre-existing right to judicial review of consular decisions at the behest of aliens abroad, see *Tom We Shung*, 352 U.S. at 184 n.3, 185 n.6—much less at the behest of their sponsors in the United States—and no serious constitutional concern would be raised by a preclusion of judicial review of visa processing decisions at the behest of either.

5. Respondents assert (Br. in Opp. 23-27) that the decision below presents no threat to the operation of the Comprehensive Plan of Action (CPA), including voluntary repatriation, because the United States in the past processed Vietnamese migrants' applications in Hong Kong; because other nations have accepted applications from screened-out Vietnamese in Hong Kong; and because (they contend) most migrants in Hong Kong are concerned about matters other than the United States' immigrant visa processing policy. It was precisely that processing by the United States, however, that led to objections from the United Nations High Commissioner for Refugees (UNHCR) and other CPA signatories, which, in turn, led the United States to re-examine its policy and to make a commitment to other nations that it would no longer process screened-out migrants in Hong Kong. See Pet. 6-7. At the February 1995 and March 1996 meetings of the steering committee administering the CPA, the United States agreed not to consider screened-out Vietnamese migrants for resettlement until they return to Vietnam, because of the effect of such consideration on voluntary repatriation. See Pet. 7.[4]

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[4] As recently as March 28, 1996, the UNHCR representative in Hong Kong also stated that the UNHCR would "regard the full-scale resumption of the processing of immigrant visa applications from

The United States is the destination of choice for the great majority (by far) of migrants in Hong Kong, and the United States has admitted much larger numbers of Vietnamese as refugees and as immigrants than have other countries. It is the United States' policy, therefore, that has the most significant impact on the willingness of the migrants in Hong Kong to cooperate in voluntary repatriation. Leininger Aff. ¶ 15 (June 15, 1995) (*Lisa Le* C.A. App. 199).[5] And even if a screened-out Vietnamese migrant in Hong Kong were not today eligible for an immigrant visa to the United States, he might tomorrow become the beneficiary of an immigration preference by marrying a U.S. citizen or permanent resident, or as a result of an employment-based petition filed by an American employer-sponsor. Sykes Aff. ¶ 10 (Feb. 16, 1996) (lodged with the Clerk with the petition in this case). Thus, as a result of the decision below, even migrants not currently eligible for an immigration preference will be less likely to

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screened-out Vietnamese boat people by the United States as undermining undertakings it has made within the context of the [CPA]," for such processing "would be a disincentive to the voluntary repatriation of the remaining camp population to Vietnam, at a crucial time in our efforts to conclude the CPA in a safe and honorable fashion." See Attach. B to Reply Memorandum in Support of Application for a Stay, *United States Dep't of State, Bureau of Consular Affairs* v. *Lisa Le*, No. A-854 (filed Apr. 18, 1996).

[5] "*Lisa Le* C.A. App." refers to the appendix filed by the government in the court of appeals in *Lisa Le*, along with a brief, when the government requested an expedited appeal and initial hearing en banc, before the court of appeals issued a briefing schedule. We previously referred to that appendix as "the joint appendix filed by the parties" (see Pet. 3 n.1). When the government filed its motion for expedited appeal, brief, and appendix in *Lisa Le*, the government attorneys requested that respondents designate contents for the joint appendix. They declined to do so, taking the position that no brief or appendix should be filed before a briefing order was issued.

return to Vietnam, due to the prospect of processing immigrant visa applications in Hong Kong in the future.

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For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be held pending the decision of the en banc court of appeals in *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*, No. 95-5425 (D.C. Cir.), and then disposed of as appropriate in light of that decision.[6]

Respectfully submitted.

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MAY 1996

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[6] In other circumstances, an alternative disposition would be for this Court to grant the petition, vacate the judgment of the court of appeals, and remand to that court for further consideration in light of the order granting initial en banc consideration in *Lisa Le*. The panel below, however, has already denied a motion by the government to vacate its judgment in this case (or stay issuance of its mandate) and to hold the case pending the decision by the en banc court in *Lisa Le*. See Pet. 14.